

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MELISSA M. KNOX</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 195,883
<b>NATIONAL BEEF PACKING COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>LUMBERMEN'S UNDERWRITING ALLIANCE</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

All of the parties requested the Appeals Board to review the Award entered by Administrative Law Judge Jon L. Frobish on March 26, 1996. The Appeals Board heard oral argument by telephone conference on September 10, 1996.

**APPEARANCES**

Claimant appeared by her attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Shirla R. McQueen of Liberal, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Gail L. Carpenter of Great Bend, Kansas. There were no other appearances.

**RECORD**

The Appeals Board considered the record listed in the Award.

**STIPULATIONS**

The Appeals Board adopted the stipulations listed in the Award. Additionally, the Appeals Board adopted the stipulation of the parties at oral argument that claimant's average weekly wage was \$332.76 through June 27, 1995, and thereafter \$354.52 which included fringe benefits discontinued by the respondent.

**ISSUES**

The claimant asked the Appeals Board to review the following issue:

- (1) Nature and extent of claimant's disability.

Respondent appealed the single issue:

- (2) The liability of the Kansas Workers Compensation Fund.

The Kansas Workers Compensation Fund (Fund) appealed the following issue for Appeals Board review:

- (3) Whether attorney fees should be assessed against the respondent and in favor of the Fund.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) The parties stipulated that claimant suffered an injury to her neck in the performance of her regular job duties of trimming calf meat while employed by the respondent. As a result of this injury, claimant had to leave work on June 24, 1993, and the parties stipulated that this was the appropriate date of claimant's accident.

Following claimant's injury, the respondent provided claimant with medical treatment through two family physicians located in Liberal, Kansas. Claimant was eventually referred to Charles W. Rimmer, Jr., a neurosurgeon located in Amarillo, Texas. Dr. Rimmer diagnosed claimant's condition as cervical spinal stenosis with numbness and tingling in her hands. In an effort to relieve claimant of her discomfort, Dr. Rimmer, on December 2, 1993, performed a laminectomy with decompression of the spinal cord from C3 to C7.

At the regular hearing held on October 18, 1995, claimant remained symptomatic with pain in her neck radiating down into her left shoulder. Although claimant had not seen Dr. Rimmer since September 1994, she remained on the pain medication he had prescribed. Claimant had not returned to her employment with respondent and respondent had not offered her a job within her permanent work restrictions. Claimant was not employed at the

time of the regular hearing but did testify she was looking for employment within her restrictions.

The parties agreed that claimant was eligible for permanent partial general disability benefits based on work disability as defined in K.S.A. 1992 Supp. 44-510e. Two vocational experts presented testimony in this case in regard to the two components of the work disability test, claimant's loss of ability to perform work in the open labor market and her loss of ability to earn a comparable wage. Karen Crist Terrill testified on behalf of the respondent and Jerry D. Hardin testified on behalf of the claimant.

The Administrative Law Judge adopted the opinions and analysis of Karen Terrill on the issue of work disability utilizing the permanent restrictions placed on claimant by Ernest R. Schlachter, M.D. Dr. Schlachter examined the claimant at the request of claimant's attorney on April 4, 1995. The Administrative Law Judge found from Ms. Terrill's analysis that claimant had lost 41 percent of her ability to perform work in the open labor market and 15 percent of her ability to earn a comparable wage. He then averaged those two percentages and found claimant was entitled to permanent partial general disability benefits based on work disability in the amount of 28 percent.

The claimant, however, disagrees with the Award of the Administrative Law Judge and argues that the appropriate work disability should be 47 percent. The 47 percent should be determined by equally weighing both Ms. Terrill's opinion and Mr. Hardin's opinion utilizing Dr. Schlachter's permanent restrictions.

Conversely, respondent urges the Appeals Board to affirm the Administrative Law Judge's work disability award in the amount of 28 percent. The respondent asserts the award should be affirmed because the Administrative Law Judge was correct in adopting Ms. Terrill's opinion instead of Mr. Hardin's opinion. The respondent concludes Mr. Hardin erred when he eliminated certain clerical jobs the claimant had the ability to perform from her post-injury labor market. The elimination of those clerical jobs inflated claimant's labor market loss percentage.

After reviewing the reports and testimony of the two vocational experts, the Appeals Board agrees with respondent and the Administrative Law Judge that in this instance Ms. Terrill's analysis and opinions concerning claimant's labor market loss and wage loss are the most accurate and should be the basis of determining claimant's work disability. The Appeals Board finds claimant had the educational background and ability to perform certain clerical jobs that Mr. Hardin eliminated from claimant's post-injury labor market. The Appeals Board also concludes based on claimant's residual symptoms, her substantial 26 percent permanent functional impairment rating, and the severity of her injury that Dr. Schlachter's more restrictive work limitations should be utilized as opposed to C. Reiff Brown's, M.D., restrictions when determining claimant's appropriate work disability.

Therefore, the Appeals Board affirms the Administrative Law Judge adoption of Ms. Terrill's opinion in regard to claimant's labor market loss of 41 percent. However, the

Appeals Board finds claimant's appropriate wage loss should be determined by using Ms. Terrill's opinion that claimant retains the ability to earn post-injury \$6.50 per hour or \$260 per week compared to claimant's stipulated pre-injury average weekly wage without fringe benefits of \$332.76 per week and with fringe benefits of \$354.52 per week. This would result in a 22 percent and a 27 percent wage loss respectively which then should be averaged with the 41 percent labor market loss resulting in a work disability through June 27, 1995, in the amount of 31.5 percent and thereafter 34 percent. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

(2)(3) The Administrative Law Judge found the respondent had failed to establish Fund liability as it failed to prove that the claimant was a handicapped employee knowingly retained by the respondent. See K.S.A. 1992 Supp. 44-567(b). Furthermore, the Administrative Law Judge found the respondent failed to establish that claimant's resulting disability was either caused or contributed to by her preexisting impairment. See K.S.A. 1992 Supp. 44-567(a)(1)(2). The Appeals Board agrees with the Administrative Law Judge that the respondent failed to prove Fund liability. Persuasive evidence contained in the record indicates that claimant's 1992 left shoulder condition was diagnosed by Dr. Garcia as scapular bursitis unrelated to her spinal stenosis condition. Dr. Garcia testified that after he treated claimant's left shoulder condition he returned her to temporary light work for 30 days and then to regular work with no restrictions. Claimant testified her left shoulder injury resolved and she was able to perform her regular work activities without accommodation. Furthermore, the record contains no evidence that claimant's spinal stenosis was symptomatic or constituted a permanent functional impairment until May 19, 1993, when claimant first noticed symptoms in her neck which was later diagnosed as an aggravation to her preexisting spinal stenosis condition.

Although the Appeals Board finds the respondent failed to establish Fund liability, the Appeals Board concludes attorney fees should not be assessed against the respondent and in favor of the Fund. The Appeals Board finds that since the claimant had sustained a previous shoulder injury and it was later discovered claimant had a preexisting spinal stenosis condition, it was appropriate for the respondent to implead the Fund. Additionally, under those circumstances it was appropriate to litigate the Fund liability issue.

All other findings and conclusions contained in the Award of the Administrative Law Judge that are not inconsistent with the above are adopted by the Appeals Board.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated March 26, 1996, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Melissa M. Knox, and against the respondent, National Beef Packing Company, and its insurance carrier,

Lumbermen's Underwriting Alliance, for an accidental injury which occurred June 24, 1993, and based upon an average weekly wage of \$332.76 through June 27, 1995, and an average weekly wage of \$354.52 thereafter.

Claimant is entitled to 67 weeks of temporary total disability at the rate of \$221.85 per week or \$14,863.95 through October 6, 1994, followed by 37.71 weeks of permanent partial disability compensation at the rate of \$69.88 per week or \$2,635.17 through June 27, 1995, for a 31.5% permanent partial general disability, followed by 310.29 weeks of permanent partial disability compensation at the rate of \$80.36 per week or \$24,934.91, for a 34% permanent partial general disability making a total award of \$42,434.02.

As of April 10, 1997, there is due and owing claimant 67 weeks of temporary total disability compensation at the rate of \$221.85 per week or \$14,863.95, plus 37.71 weeks of permanent partial disability compensation at the rate of \$69.88 per week or \$2,635.17, plus 93.29 weeks of permanent partial disability compensation at the rate of \$80.36 per week for a total due and owing of \$24,995.90 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$17,438.12 shall be paid at \$80.36 per week for 217 weeks or until further order of the Director.

The respondent is to pay 100% of the award and the Kansas Workers Compensation Fund has no responsibility for any portion thereof.

All remaining orders of the Administrative Law Judge are adopted by the Appeals Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS  
Shirla R. McQueen, Liberal, KS  
Gail L. Carpenter, Great Bend, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director